IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DONALD J. TRUMP, *et al.*, Plaintiffs-Appellants, v. DEUTSCHE BANK AG, *et al.*, Defendants-Appellees.	Docket No. 19-1540-cv

MEDIA COALITION'S REPLY IN SUPPORT OF ITS MOTION TO INTERVENE AND TO UNSEAL JUDICIAL RECORDS

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PRELIMINARY STATEMENT

The Media Coalition—Associated Press, Cable News Network, Inc., Dow Jones & Company, Inc., The New York Times Co., POLITICO LLC, Reuters News & Media Inc., and WP Co., LLC, d/b/a the Washington Post—moved to unseal names redacted from the Deutsche Bank Letter,[1] under both the First Amendment and the common law rights of access to judicial documents. Deutsche Bank and the Trump Parties oppose this unsealing, but neither has carried its burden of demonstrating a substantial risk to a compelling governmental interest sufficient to overcome the public's rights of access.[2]

Deutsche Bank fails to address either right of access. Instead, it invokes a contractual provision—applicable to only one of the two individuals whose names are redacted—without providing the contract(s) at issue or addressing the well-established law in this Circuit holding that a contractual confidentiality provision does not overcome the First Amendment or common law right of access.

The Trump Parties purport to address both rights of access, but, in contending that these qualified rights of access are overcome here, disregard the

[1] Capitalized terms, unless otherwise defined, have the meaning stated in the Media Coalition's Motion to Intervene and Unseal (Dkt. 172, 176).

[2] Capital One did not take a position on the Media Coalition's motion. Dkt. 188. The Committees stated that they oppose unsealing only to the extent the names belong to non-parties, but did not file a response. Dkt. 190.

more stringent standard under the First Amendment, instead conflating it with the less-stringent common law balancing test. At bottom, the Trump Parties have failed to meet their burden of demonstrating a compelling interest in maintaining under seal the two *names* at issue—the Media Coalition does not here seek copies of tax returns or any financial information. Given the subjects of the Congressional investigations and the relationship of this information to a sitting president, the public interest in this information could not be higher, and the privacy interests alleged are simply insufficient to outweigh that interest.

ARGUMENT

I. THE FIRST AMENDMENT RIGHT OF ACCESS REQUIRES UNSEALING THE NAMES REDACTED FROM THE DEUTSCHE BANK LETTER.

The First Amendment to the U.S. Constitution provides the press and public with a right of access to judicial records and proceedings. *Press-Enter. Co. v. Super. Ct.* ("*Press-Enter. II*"), 478 U.S. 1, 9 (1986); *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 298 (2d Cir. 2012) (recognizing right of access not only to trials but to all "related proceedings and records"); *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 139 (2d Cir. 2016) (per curiam).

The Trump Parties incorrectly argue that the First Amendment right of access is a sliding scale that changes depending on, among other things, the role

the sealed material plays in a court's decision. *See* Pl. Opp. to Media Coalition Mot. to Unseal, Dkt. 186 ("Trump Opp."), at 4. Once the First Amendment right of access attaches to a judicial document, however, a court may seal that document or portions of it *only* if the proponent of sealing demonstrates that there is a substantial probability of harm to a compelling governmental interest, that no reasonable alternative exists, that any limitation is narrowly tailored, and that any restriction will be effective to protect the interest at stake. *Press-Enter. II*, 478 U.S. at 13-14; *Bernstein*, 814 F.3d at 141 ("A '[f]inding that a document is a judicial document triggers a presumption of public access, and requires a court to make specific, rigorous findings before sealing the document or otherwise denying public access'" (quoting *Newsday LLC v. Cty. of Nassau*, 730 F.3d 156, 167 n.15 (2d Cir. 2013))).

Here, the Deutsche Bank Letter is a judicial document to which the First Amendment right of access attaches, and neither the Trump Parties nor Deutsche Bank have met their burden of identifying a substantial risk to a compelling government interest from unsealing the redacted names in question.

A. The Deutsche Bank Letter is a Judicial Document to which the First Amendment Right of Access Applies.

Filings are "judicial document[s]" when they are "relevant to the performance of the judicial function and useful in the judicial process." *Bernstein*, 814 F.3d at 139 (quoting *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119

(2d Cir. 2006)). Put differently, documents are "judicial records" if they "would reasonably have the tendency to influence a district court's ruling on a motion or in the exercise of its supervisory powers." *Brown v. Maxwell*, 929 F.3d 41, 49 (2d Cir. 2019). The Trump Parties contend that the Deutsche Bank Letter is not a "judicial record" because the Court did not expressly request the names that Deutsche Bank included and might not rely upon the names in reaching its ruling in the case. Trump Opp. at 4-7.

This Circuit, however, expressly rejected the Trump Parties' argument more than a decade ago, in *Lugosch*. 435 F. 3d at 123 ("Nor was the district court correct to suggest that different types of documents might receive different weights of presumption based on the extent to which they were relied upon in resolving the motion."). There, this Circuit reversed an order sealing summary judgment filings until after the trial court's ruling, explaining that the right of access attaches when documents are *submitted* to the court for consideration, regardless of whether or not the court at some point thereafter relies upon them in deciding the motion. *Id.* at 123-24; *see also, e.g.*, *Brown*, 929 F.3d at 50 ("[T]he proper inquiry is whether the documents are relevant to the performance of the judicial function, not whether they were relied upon."); *Bernstein*, 814 F. 3d at 139 (judicial documents are those "relevant" or "useful" in the judicial process).

The Trump Parties simply ignore this long-settled line of authority, instead relying on *Gambale v. Deutsche Bank, AG*, 377 F.3d 133, 143 (2d Cir. 2004). Trump Opp. at 6. But that decision pre-dates *Lugosch*, *Bernstein* and *Brown*, and addresses only the common law right of access, not the First Amendment. *Gambale*, 377 F.3d at 140 n.4. Moreover, *Gambale* is distinguishable on the facts. There, this Court permitted the sealing of a settlement amount (included in a confidential settlement agreement ending the case, not at issue in the litigation) that was only disclosed on the record because of the court's "casual questioning of counsel in the course of proceedings addressing the settlement, not the adjudication." *Id.* at 143. Notably, the trial court's unsealing of summary judgment documents that *were* submitted for consideration was uncontested and approved by this Court under the common law right of access. *Id.* at 139-40.

Deutsche Bank filed the Letter in response to a request from the Court, to assist the Court in addressing an issue that the Court explained was "a fairly important question in this case." Trump Opp. at 5 (quoting O.A. Recording 1:33:51-34:05). While it may be true that the Court did not request the specific names that Deutsche Bank elected to include in its letter, parties to civil and criminal cases routinely include in their court filings information and argument that others will oppose as "unnecessary" to the judicial decision, but the public's rights of access have never heretofore been limited to that portion of judicial records that

can be deemed "necessary" to judicial action. Rather, it is the act of filing such documents, contending that the document in general is "relevant" to the judicial process, that triggers the public's presumptive right of access. *E.g.*, *Lugosch*, 435 F.3d at 122 (First Amendment right of access attaches to documents "which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings" (quoting *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 409 (1st Cir. 1987))). Here, the Deutsche Bank Letter, including the portions of it that contain the redacted names at issue, unquestionably is a "judicial document" to which the First Amendment access right attaches.

B. Neither the Trump Parties Nor Deutsche Bank Have Met Their Burden to Demonstrate a Substantial Risk to a Compelling Government Interest.

The Supreme Court has stressed that, under the First Amendment, a denial of public access to a judicial record is permissible only when "essential to preserve higher values." *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 510 (1983). "Conclusory assertions" and the mere "possibility" of harm are insufficient. *See, e.g.*, *Press-Enter. II*, 478 U.S. at 15 ("The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of" right to fair trial.).

Neither Deutsche Bank nor the Trump Parties have articulated any substantial, non-speculative risk to a compelling interest that would necessarily

follow from placing the two names at issue in the public record. Indeed, the Trump Parties do not argue that the cited privacy concerns constitute compelling interests in the first instance, contending instead that these purported privacy concerns are "countervailing reasons" for redactions, given what they contend is "the weakness of any presumption" of access under the common law test. Trump Opp. at 7. This is far from sufficient to meet their First Amendment burden.

1. Privacy Interests in Financial Records

Unsealing the Letter does not pose any genuine threat to a privacy interest that would rise to the level of a compelling governmental interest. Courts considering the First Amendment right of access have found that, "privacy and reputational concerns typically don't provide sufficient reason to overcome a qualified First Amendment right of access." *United States v. Loughner*, 769 F. Supp. 2d 1188, 1195 (D. Ariz. 2011). Even in circumstances in which a privacy interest might carry such weight, "a formulaic recitation of such an interest will not suffice to justify sealing." *United States v. Strevell*, No. 05-CR-477 (GLS), 2009 U.S. Dist. LEXIS 19020, at *13-15 (N.D.N.Y. Mar. 3, 2009) (unsealing "personal information concerning defendant").

The Trump Parties assert that financial records "weigh more heavily against access," Trump Opp. at 7, relying on *United States v. Amodeo*, but that decision does not support their contention that they have a privacy interest in *names*, as

opposed to actual financial records, and that decision, too, involves only the common law balancing test for public access, not the more stringent First Amendment test. 71 F.3d 1044, 1051 (2d Cir. 1995) ("*Amodeo II*"). The sentence from the opinion quoted in part by the Trump Parties reads, in full, "Financial records of a wholly owned business, family affairs, illnesses, embarrassing conduct with no public ramifications, and similar matters will weigh more heavily against access than conduct affecting a substantial portion of the public." *Id*. Setting aside that the *Amodeo* court was addressing only the common law access right, here, the redacted names—not financial records—do affect a substantial portion of the public, as they are at the core of a dispute between a sitting president and the U.S. House of Representatives and relate to Congressional investigations into foreign influence in the U.S. political process, foreign counterintelligence threats, and the safety of banking practices. *See* Dkt. 65 at 1. At bottom, *Amodeo II* does not address whether protecting the confidentiality of financial records, much less the names of the people to whom the records relate, constitutes a compelling interest sufficient to overcome the First Amendment right of access. The litany of unrelated situations in which the law protects tax returns (not the names of those

filing returns) offered by the Trump Parties is similarly non-responsive. *See* Trump Opp. at 9-10.[3]

The Trump Parties also have failed to demonstrate that there is a genuine privacy interest in the information at issue here. The individuals are all adult members of the Trump family (and, likely, parties to this case), who have a diminished privacy interest by virtue of their involvement in their relative's political campaign and official activities. *See In re Application of N.Y. Times For Access to Certain Sealed Records*, 585 F. Supp. 2d 83, 93 n.14 (D.D.C. 2008); *In re Special Proceedings*, 842 F. Supp. 2d 232, 246 (D.D.C. 2012); Media Coalition Mem. at 12 (discussing same).

Moreover, the idea that Deutsche Bank's acknowledgment that it *possesses* copies of tax returns for a particular individual might give away the "nature" of that individual's business is purely speculative, and necessarily insufficient to overcome the public's constitutional right of access to court records referencing that individual's *name*. *See Press-Enter. II*, 478 U.S. at 15; *Strevell*, 2009 U.S.

[3] The cited cases include *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 311 (1985) (evaluating IRS compliance with "John Doe" summons requirements); *Solomon v. Siemens Indus.*, 8 F. Supp. 3d 261, 265 (E.D.N.Y. 2014) (addressing access to tax returns, not names of tax filers); *Church of Scientology v. IRS*, 792 F.2d 153, 155 (D.C. Cir. 1986) (discussing FOIA guidelines for tax return information that cannot be attributed to taxpayers); 18 U.S.C. § 1905 (prohibiting disclosure of tax returns by federal employees); 26 U.S.C. § 7213 (same).

Dist. LEXIS 19020, at *13-15. Banks may request copies of tax returns for any number of reasons. Deutsche Bank's possession of tax returns does not reveal any specific business endeavor, and even if it did, no proponent of sealing has identified case law protecting a privacy interest in the "nature" of one's business, much less a privacy interest of constitutional magnitude.

2. Statutory Arguments under the GLBA

The Trump Parties also insist that the GLBA prohibits disclosure of the names, without addressing any of the earlier failures of this argument, which Deutsche Bank included in the Letter but largely abandoned in its own Opposition.

First and foremost, the First Amendment interest in public access to judicial proceedings and records supersedes statutory confidentiality provisions, unless the provisions are themselves narrowly tailored to protect a compelling interest. *See, e.g.*, *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 610-11 (1982) (invalidating state statute presumptively excluding press and public from courtroom during testimony of underage victim of sexual offense); *see also Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (invalidating state statute criminalizing publication of name of victim of sexual offense on First Amendment grounds).[4]

[4] The Media Coalition is not contending that the GLBA is unconstitutional, nor would the unsealing of the Deutsche Bank Letter require such a finding. *See* Trump Opp. at 8 n.2. Rather, the Coalition argues that statutory provisions (even if

Second, the GLBA does not apply to the names at issue. It expressly does not apply to names that are "publicly available," 16 C.F.R. § 313.3(n)(3)(ii), and the Trump Parties have not identified any law to support their claim that the GLBA would protect the "nature" of these known individuals' business with Deutsche Bank, even if it could otherwise be said that disclosure of the *names* would somehow disclose something about the "nature" of their business.[5]

3. Contractual Obligations

For its part, Deutsche Bank continues to rely on contractual confidentiality provisions to justify sealing, without addressing *Bernstein* and despite acknowledging that it has such contracts with only one of the two individuals whose names are at issue. Response of Deutsche Bank AG, Dkt. 184 ("Deutsche Bank Opp."), at 2. As the Media Coalition has demonstrated, the mere existence of contractual confidentiality provisions regarding a document that has become a

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applicable, which the GLBA is not) must give way to constitutional rights in particular circumstances. *See Globe Newspaper*, 457 U.S. at 610-11.

[5] The Trump Parties cite other cases involving the GLBA, Trump Op. at 8-9, that are readily distinguishable, as the Media Coalition pointed out in its opening memorandum. *See* Media Coalition Mem. at 13-14 (distinguishing *Martino v. Barnett*, 595 S.E.2d 65, 72 (W. Va. 2004) (requiring production of GLBA protected information in personal injury discovery dispute); *Alpha Funding Grp. v. Cont'l Funding, LLC*, 17 Misc. 3d 959, 968-70 (Sup. Ct. N.Y. Cty. 2007) (resolving discovery dispute, under New York state law, over loan and tax return information not relevant to case)).

judicial record is insufficient to overcome a constitutional right of access to that record. *See, e.g., Bernstein*, 814 F.3d at 141-42 (unsealing pleadings in civil case despite parties' settlement agreement conditioned on maintenance of records under seal).

Deutsche Bank fails to carry its burden of demonstrating that a binding contractual confidentiality provision even *exists*. Deutsche Bank has not tendered a copy of the contract, either publicly or under seal. Instead, it relies on out-of-context quotations from one, or possibly multiple, unidentified documents. Moreover, the portion of the purported contract quoted by Deutsche Bank expressly provides that Deutsche Bank may disclose the information "'to the extent required by applicable laws.'" Deutsche Bank Opp. at 2 (quoting purported contract).

"The burden is heavy on those who seek to restrict access to the media, a vital means to open justice." *See ABC, Inc.*, 360 F.3d 90, 106 (2d Cir. 2004). Deutsche Bank and the Trump Parties have failed to carry their burden of identifying a substantial risk to a compelling interest, and the First Amendment requires that the names in question in the judicial record at issue be un-sealed.

II. THE COMMON LAW RIGHT OF ACCESS ALSO REQUIRES RELEASE OF THE REDACTED NAMES.

In addition to the First Amendment right of access, courts recognize a common law right of access to judicial documents. *Bernstein*, 814 F.3d at 142

(quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978)). This right of access attaches to documents that are "presented to the court to invoke its powers or affect its decisions," *id.* (citation omitted), considering "(a) 'the role of the material at issue in the exercise of Article III judicial power' and (b) 'the resultant value of such information to those monitoring the federal courts.'" *Newsday*, 730 F.3d at 165 (quoting *Amodeo II*, 71 F.3d at 1049). Courts then balance these factors against "countervailing interests favoring secrecy." *Id.*

The Trump Parties argue that the Deutsche Bank Letter, or at least the particular portion at issue, does not have a substantial role in the Court's Article III functions. Trump Opp. at 5. But the Deutsche Bank Letter was specifically requested by, and provided to, the Court as part of its decision-making process, invoking a strong common law presumption of access. *See Bernstein*, 814 F.3d at 142. Further, as this Court recently ruled, the presumption of access is not limited to dispositive documents; a "lesser—but still substantial—presumption of access" attaches to a broad range of discovery motions, motions *in limine*, and other "non-dispositive" filings. *Brown*, 929 F.3d at 53 (unsealing summary judgment record; remanding for further review of record on other motions). By comparison, documents to which only a minimal presumption of access might attach are those that are only "passed between the parties" and not presented to the court. *See Bernstein*, 814 F.3d at 142.

In determining the weight of the common law presumption, courts also consider public interest in the materials and in "monitoring the federal courts," *see Newsday*, 730 F.3d at 165 (citation omitted), considerations omitted by the Trump Parties and Deutsche Bank from their arguments. Here, the public interest in this case and in this particular information is, in a word, extraordinary. The identities of which two specific persons—from among a small group whose identities *are already publicly known* and who are *themselves plaintiffs in this very lawsuit*—the President and his close associates continue to seek to protect from Congressional inquiry is of substantial value to those monitoring both the Judicial Branch's and Congress's exercise of their respective functions under our constitutional system of government. *See id.*; *see also, e.g.*, *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("[I]t can hardly be doubted that the constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.").

Given all of these factors, the presumption of access to the Deutsche Bank Letter is high, and, because neither the Trump Parties nor Deutsche Bank have identified any valid, countervailing interest favoring secrecy, the common law right of access weighs in favor of full disclosure of the contents of the Deutsche Bank Letter.

CONCLUSION

For the reasons stated above and in its opening memorandum, the Media Coalition respectfully requests that the Court (i) grant its motion to intervene in this action for the limited purpose of enforcing the public's right of access to judicial proceedings and records, which no party has opposed; and (ii) unseal the information redacted by Deutsche Bank in its August 27, 2019, letter to the Court, without further delay.

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Respectfully submitted,
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